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No. 99-2039

In The

Supreme Court of the United States

TERRY WEST, INDIVIDUALLY AND AS GUARDIAN OF A MINOR, T.W., AND T.W., A MINOR,

Petitioners,

v.

DERBY UNIFIED SCHOOL DISTRICT NO. 260,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF CASE

The facts are substantially as presented in the petition with the exception that petitioners underreport the severity of the racial unrest the school district's policy was intended to address. Numerous potentially violent encounters occurred in the district prior to the creation of the district's policy. White supremacist students wore shirts bearing the image of the Confederate flag. African-American students responded by wearing shirts bearing an "X" denoting support for the teachings of Malcolm X. White students countered wearing shirts that stated "You wear your X and I'll wear mine" (with a Confederate flag shown to represent the X on the back of a shirt). A Derby High School student witnessed a verbal encounter during which a white student, wearing the Confederate flag shirt, said to an African-American student wearing a Malcolm X shirt, "Nice shirt, nigger" and "Fucking nigger."

The Aryan Nation hosted an event directly across the street from the Derby High School to solicit members. The Ku Klux Klan and Aryan Nation passed out literature and pamphlets off campus that students brought to school to distribute. The literature relating to KKK philosophies bore the Confederate flag insignia.

There was also evidence of racial tension at the Derby Middle School. Spray painted graffiti appeared on the walls at the Derby High School football stadium which is located on the grounds of the Derby Middle School. Graffiti also appeared in the bathrooms at the middle school. This graffiti included phrases such as "Die Nigger," "KKK" and "White Power." There was also

graffiti which included "KKKK," the fourth K standing for killer, which was intended to mean "Kill the KKK."

On at least one occasion, actual violence did erupt, when a fight broke out at a high school football game as a result of a student wearing a headband bearing the image of a Confederate flag.

School officials, parents and the Derby community thought the racial problems developing in Derby schools were so severe they formed a 350-member task force to address the hostile and potentially violent atmosphere that existed in the district. The task force worked on these issues for four months and ultimately recommended the adoption of the "Racial Harassment or Intimidation Policy" which is the subject of this action.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS FOLLOWS PRIOR SUPREME COURT RULINGS INCLUDING *TINKER V. DES MOINES*.

Petitioners attempt to cloud their First Amendment argument by claiming the Tenth Circuit's decision impermissibly limits the holding in Tinker. The petitioners assert that language adopted by the Tenth Circuit imposes a requirement that students have a "legitimate educational purpose" in order to possess controversial symbols at school. This is simply a misstatement of the Court's holding. School officials and the District Court recognize the Confederate flag as a legitimate and valuable part of American history. As such, the Confederate

flag has a place in students' text books and other educational tools. However, as evidenced by the events in Derby schools, when students display the Confederate flag outside the school curriculum there is a real threat of violence. "School officials in Derby had evidence from which they could reasonably conclude that possession and display of Confederate flag images when unconnected with any legitimate educational purpose would likely lead to a material and substantial disruption of school discipline." *West v. Derby Unified School District No. 260*, 206 F.3d 1358, 1366 (2000) (*quoting West v. Derby Unified School District No. 260*, 23 F.Supp.2d 1231-34 (1999)). This language reflects nothing more than the Court's acknowledgment of the dual role the Confederate flag plays in American society as both a symbol of our history and a symbol of racial hatred and divisiveness. The Court was merely placing a limitation on the policy to preserve use of the flag for educational purposes.

Petitioners continue to insist on analogizing the facts of the present case to those in *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969). This is incorrect. In *Tinker*, a small group of students were suspended for wearing black armbands in a peaceful protest after school officials banned black arm bands fearing a possible violent reaction. In this case, the Confederate flag did not only have the potential to cause a violent reaction, but had been the focus of prior racial unrest in the Derby school district which had severely disrupted the school. As stated above, the existence of a dangerous climate of racial tension is well documented. This is a dramatically different situation than was present in *Tinker*.

Tinker did not confer absolute freedom of speech on students in public schools. Justice Stewart explained in his concurring opinion:

> [A] State may permissibly determine that, at least in some precisely delineated areas, a child – like someone in a captive audience – is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees.

Id. at 515, *quoting Ginsberg v. New York*, 390 U.S. 629, 649-650 (1986).

The Court also specifically held that conduct which is disruptive may still be regulated:

> But conduct by the student, in class or out of it, which for any reason – whether it stems from time, place, or type of behavior – materially disrupts class work or involves substantial disorder or invasion of the rights of others, is, of course, not immunized by the constitutional guarantee of freedom of speech.

Id. at 513, *citing Blackwell v. Issaquena County Bd. of Ed.*, 363 F.2d 749 (5th Cir. 1966).

In the present case it is important to note that T.W. had no particular intent associated with the drawing other than to violate the policy. This severely hampers T.W.'s First Amendment claim, because he admits that he did not intend to convey any message by his conduct. This moves the drawing from conduct which is intended to project a message, and thus protected by the First Amendment, to pure conduct, which is not entitled to First Amendment protection.

Following *Tinker*, the Court further strengthened the right of school officials to enact policies which prohibit students' conduct even if it is considered speech. In *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), the Court upheld a policy which prohibited the use of obscene language in its schools. The Court reasoned that "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board." *Id.* at 683. The court further noted that a student's free speech right must be "balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior." *Id.* at 681.

Two years after *Bethel*, the Court decided *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 258 (1988). The Court upheld a public high school's right to edit out inappropriate articles in a school-sponsored newspaper. In *Hazelwood*, the Supreme Court recognized that the:

> First Amendment rights of students in public schools are not automatically coextensive with the rights of adults in other settings, and must be applied in light of the special characteristics of the school environment. A school need not tolerate student speech that is inconsistent with its basic educational mission even though the government could not censor similar speech outside the school.

Thus, under appropriate circumstances, schools are not only permitted, but owe a duty, to regulate the content of student speech. By affirming the District Court's determination that the Derby school district acted appropriately in this case and the policy did not violate the

Constitution, the Tenth Circuit followed rather than modified existing Supreme Court authority.

Further authority to justify the Tenth Circuit's opinion can be found in other federal court decisions. Using the *Tinker* standard, federal courts have specifically upheld a school's right to prohibit mere possession of the Confederate flag, regardless of the possessor's intent. In *Melton v. Young*, 465 F.2d 1332 (6th Cir. 1972), a public high school had experienced racial tension, much of which was centered around the Confederate flag, and the school adopted a policy which prohibited any image of the Confederate flag on school grounds. After being advised of the policy, Melton wore a jacket bearing the image of the Confederate flag on one sleeve. He was asked to remove the coat, and when he refused, he was suspended. The Fifth Circuit Court of Appeals reviewed the history of racial tension at the school and concluded that the school had every right to anticipate that a "tense racial situation continued to exist at Brainerd, and that repetition of the previous years' disorders might reoccur if student use of a Confederate symbol was permitted . . . " *Id.* at 1334.

The *Melton* Court reasoned that while the exercise of free speech was a fundamental constitutional right, equally important was the school's need to maintain decorum so that the learning process could be carried out in an orderly manner. *Id.* at 1334.

The *Melton* Court distinguished the facts from those in *Tinker*:

> Unlike the *Tinker* case, where the court found no evidence of either actual or potential disruptive

> conduct, but only an 'undifferentiated fear or apprehension of disturbance,' the record in the present case reflects quite clearly that there was substantial disorder at Brainerd High School throughout the 1969-70 school year, that this disorder most materially disrupted the functioning of the school, so much so that the school was in fact closed on two occasions, that much of the controversy the previous year had centered around the use of a Confederate flag as a school symbol and the school officials had every right to anticipate that a tense racial situation continued to exist as of the opening of school in September of 1970.

Id. at 1335.

A more recent case upholding the right of a public school system to prohibit clothing bearing the image of a Confederate flag is *Phillips v. Anderson Co. School District Five*, 987 F. Supp. 488 (D. S.C. 1997). During the five years preceding the incident which gave rise to that suit, Lakeside Middle School had experienced incidents of racial unrest, five of which related to students wearing articles of clothing bearing an image of the Confederate flag. The school had a policy which provided that "attire should not interfere with classroom instruction" and had a disciplinary policy for student interference with the instructional process or failure to obey school personnel. 987 F. Supp. at 490.

In January 1996, a student was suspended for wearing a jacket bearing an image of the Confederate flag to school. The student filed suit claiming that his suspension for failing to remove his jacket was a denial of his First

and Fourteenth Amendment rights. *Id.* at 492. The student claimed that prior racial tensions were insufficient for Lakeside school authorities reasonably to forecast that his wearing of a Confederate flag jacket would create a disruption of Lakeside's classes.

The Court responded by noting that:

> School authorities, however, are not required to wait until disorder or invasion of other students' rights occurs. If there are substantial facts which reasonably support a forecast of likely disruption, the judgment of the school authorities in denying permission and in exercising restraint will normally be sustained. Indeed, it has been held that the school authorities have a duty to *prevent* the occurrence of disturbances. *Curtailment of a student's exercise of the right of free speech does not demand a certainty that disruption will occur, but only the existence of facts which might reasonably lead school officials to forecast a substantial disruption.* (citations omitted; italics in original).

987 F. Supp. at 492.

The Court noted that the Confederate flag was a symbol which was "undisputedly offensive to at least some black students at the middle school." *Id.* at 493. The Court held that the constitutional right of a student to free speech may be "modified or curtailed by school regulations reasonably designed to adjust those rights to the needs of the school environment." *Id., quoting, Williams v. Spencer,* 622 F.2d 1200, 1205 (4th Cir. 1980) (*quoting, Quarterman v. Byrd,* 453 F.2d 54, 58 (4th Cir. 1971)).

In balancing the student's First Amendment rights with the school's interest in providing a safe educational environment for its students, the Court held:

> At Lakeside Middle School, [plaintiff's] right to wear the Confederate Flag must yield to the school's interest in affording his classmates an educational environment, conducive to learning, as much as possible, free from disruptions and distractions.

Id. at 493.

Denno v. School Bd. Of Volusia County, Fla., 2000 WL 1005058 (11th Cir. 2000), is the latest case involving suspension of a student for display of the Confederate flag. A panel of the Eleventh Circuit upheld the district court's dismissal of a student's complaint regarding his suspension for display of the Confederate flag. The Eleventh Circuit considered a qualified immunity issue not presented in the *West* case. While factually distinguishable from the instant case, the holding in *Denno* once again supported the school district's right to reasonably limit a student's display of the Confederate flag.

The Tenth Circuit correctly applied the existing law to the facts of this case. The Derby school district clearly met the standard laid out in *Tinker* and the Tenth Circuit correctly upheld the district's right to regulate disruptive student behavior. As the Tenth Circuit's holding is consistent with existing law, certiorari is inappropriate.

II. THE SCHOOL DISTRICT'S RACIAL HARASSMENT POLICY IS NOT OVERBROAD.

A statute must be substantially overbroad to be invalidated on its face. The mere fact that one can conceive of some impermissible applications of a policy is insufficient. Instead, there must be a realistic danger that the policy itself will significantly compromise recognized First Amendment protections of the parties not before the court. *Members of City Council v. Tax Payers for Vincent*, 466 U.S. 789, Syl. ¶¶2 and 3 (1984). Not just overbreadth, but substantial overbreadth, must be shown. *Id.* at 799-800. The overbreadth must be both real *and* substantial, especially where conduct, rather than pure speech, is involved:

> To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of the statute must not only be real, but substantial as well, *judged in relation to the statute's plainly legitimate sweep.*

Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

It is important to note that each of the cases cited immediately above dealt with criminal statutes and/or statutes regulating the conduct of adults. The constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings. *Tinker, supra*, 478 U.S. at 683. The Supreme Court has also recognized that, given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, school disciplinary codes need not be as detailed as

criminal codes. *Bethel, supra,* at Syl. ¶ 7. Those who challenge policies adopted by public schools therefore have an even greater burden in attempting to demonstrate overbreadth.

Petitioners contend that the policy is overbroad because its terms ban all possession of the Confederate flag, yet there are a number of situations in which the Confederate flag is tolerated in the Derby school district. The Court found that the school district examines whether the symbol at issue has a legitimate educational purpose, and also looks at the intent of the student possessing the symbol, in weighing application of the policy. The District Court and the Tenth Circuit properly considered these limiting factors, and determined that the policy, as applied, is not overbroad. Indeed, it is not only proper, but mandatory, that the court consider these factors: "Administrative interpretation and implementation of a regulation are, of course, highly relevant to our analysis, for '[i]n evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a state court or enforcement agency has proffered.' (citations omitted)" *Ward v. Rock Against Racism,* 491 U.S. 781, 795 (1989). Since the school district had never disciplined a student for possessing depictions of the Confederate flag while involved in appropriate educational purposes, the school district's policy did not threaten protected speech and therefore is not unconstitutionally overbroad.

III. THE LIMITING CONSTRUCTION DOES NOT MAKE THE SCHOOL DISTRICT'S RACIAL HARASSMENT POLICY VAGUE.

Petitioners argue that the limiting construction expressed by the Tenth Circuit exacerbates the policy's vagueness. Petitioners correctly state that, in order to prevail on a claim of facial unconstitutional vagueness, they must prove the policy is "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Baggett v. Bullitt*, 377 U.S. 360, 367 (1964). This is a very difficult standard for the petitioner to demonstrate. In *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), the United States Supreme Court dealt with a challenge to an Oklahoma law prohibiting partisan political activity by certain state employees similar to the Hatch Act which applies to federal employees. The Court held that "[w]ords inevitably contain germs of uncertainty" but this did not render the statute unconstitutionally vague. 413 U.S. at 607.

In this case, petitioners argue that someone of reasonable intelligence would not be able to decipher what behavior or symbols constituted violations of the policy. The problem with this argument is that T.W. himself knew and understood what constituted a violation of the policy. T.W. admits that he knew what the Confederate flag was and that he knew drawing it was a violation of the policy. As the District Court concluded: "Such a state of mind is inconsistent with any claim that the policy did not give [T.W.] fair warning that his conduct was prohibited." *West v. Derby Unified School District No. 260*, 23 F.Supp.2d at 1235. The other three students sitting with T.W. completed written statements indicating they

warned T.W. not to draw the flag, or he would get in trouble. This is clear evidence that the Derby policy gives fair warning of what is prohibited.

The school district is charged generally with the education of students which includes the more specific responsibility of inculcating students with the values and civility they will need to function in society. Additionally, the school district has the responsibility to prevent disturbances and guarantee the rights of individual students to be secure and to be let alone. Policies to carry out this complex mandate and to prevent racial harassment and intimidation must by necessity have some flexibility. The school district's policy has such flexibility. Respondent asks the Court to reject the notion that persons of common intelligence must guess when they are racially harassing or intimidating another person, either through speech or by the bearing of certain symbols.

IV. THE TENTH CIRCUIT FOLLOWED SUPREME COURT PRECEDENT IN ITS TREATMENT OF PETITIONERS' EQUAL PROTECTION COUNT.

Petitioner claims the Tenth Circuit's approval of the school district's policy which banned the possession and display of a Confederate flag was displayed "missed the mark" on petitioner's equal protection claim. (Petition, p. 13). It is the petitioners' treatment of equal protection principles that misses the mark. Petitioners argue that the Tenth Circuit decision violates T.W.'s equal protection rights by punishing students in possession of the Confederate flag in non-school related material. "The general [equal protection] rule is that legislation is presumed to

be valid and will be sustained if the classification drawn by statute is rationally related to a legitimate state interest." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 437 (1985). That is all the Equal Protection Clause mandates. In the instant case the classification drawn by the policy, possession of the Confederate flag for school related purposes versus possession for non-school related purposes, is rationally related to a legitimate state interest. As the Tenth Circuit held "[t]he school district's legitimate interest in this case is clear – to prevent potentially disruptive student conduct from interfering with the educational process." *West v. Derby Unified School District No. 260*, 206 F.3d 1358, 1365 (2000).

Petitioners go on to assert that the Tenth Circuit's aforementioned treatment of equal protection condones a rule that allows the government to control the message conveyed by the symbol, by controlling how the symbol appears on school grounds. This is incorrect. The school district has no intention of projecting a message regarding the Confederate flag. It is not trying to take sides on this issue as is evidenced by the policy, which enumerates prohibitions against Black Power symbols as well. However, the Confederate flag is unique in that it has a legitimate educational purpose as a historical symbol of the South and at the same time is a modern symbol of racial hatred. Therefore, when the Confederate flag is used for non-school related activities it has the potential to incite violence. Because the school district has a legitimate interest to avoid violence among students, display of the Confederate flag for non-school related activities can be constitutionally regulated.

Petitioners next argue that the government may not grant the use of a public forum for expression of ideas it finds favorable, but deny the public forum for expression of ideas of which it disapproves. Petitioners cite *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, (1972) in support of this proposition. However, petitioners' reliance on this authority is misplaced because that case involved a criminal statute prohibiting picketing. 408 U.S. at 93. Public schools, by contrast, are not public fora unless the school has, " 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public.' " *Hazelwood, infra*, 484 U.S. at 267. No evidence was presented in this case that the Derby School District created such a public forum in its schools.

The Tenth Circuit followed equal protection principles and correctly decided that T.W.'s equal protection claim failed. Consequently, certiorari should not be granted.

V. THE TENTH CIRCUIT FOLLOWED ESTABLISHED DUE PROCESS PRINCIPLES.

Petitioners argue that T.W. did not receive due process because the investigation of the incident was not focused on determining whether he engaged in harassment or intended to do so. However, the assistant principal for the school district found, as did the district court, that T.W. disrupted class by intentionally violating the district's policy prohibiting the drawing of the Confederate flag. While the intent to harass is one factor which would justify suspension under the policy, T.W.'s intent to violate the policy also justified his suspension.

Prior to petitioner's short term suspension, he was afforded a hearing wherein the allegations made against him were explained to him and he was given the opportunity to respond. Pursuant to *Goss v. Lopez*, 419 U.S. 565 (1975) the Constitution requires that a student facing a short term suspension be entitled to oral or written notice of the charges against him and an explanation of the evidence against him. Additionally, a student should be afforded an opportunity to respond to the allegations. This is precisely the process afforded the petitioner. T.W. received notice of the allegation against him and an opportunity to be heard, after which he was suspended for knowingly and intentionally violating the school district's policy.

Petitioners next object to the description of the violation which will be present in T.W.'s school records – that he violated the school's Racial Harassment or Intimidation Policy. However, this does not affect T.W's property interest in his education. In order for this to be a valid argument, T.W. would have to establish some property interest implicated, other than the three-day suspension. T.W. would have to establish that the actual name of the violation implicates some property interest. He has not done so. T.W. is a minor, and his school disciplinary record cannot be used in any other proceeding which would adversely affect T.W.'s rights. Thus, there is no property interest implicated by the name of the violation, and no due process violation.

The Court should deny the petitioners' request for review on their due process argument.

CONCLUSION

This case has less to do with T.W.'s First Amendment right to freedom of speech than with the appropriateness of his discipline for intentionally violating a school policy. In order to maintain schools free from violence and to ensure an optimum learning environment, school administrators must have the authority to take actions they deem necessary to maintain discipline in their schools. Without the ability to establish discipline and order, teachers will find it impossible to educate students. *See New Jersey v. T.L.O.*, 469 U.S. 325, 350 (1935) (Powell, J., concurring).

The Derby Unified School District No. 260 respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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